Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

JASON L. MCCLAREN,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

On Petition For Writ Of Certiorari
To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments permit a trial court to force a defendant to choose between waiving his right to remain silent by telling the State before trial what he knew or did not know about his accuser's violent past, or foregoing the presentation of otherwise concededly relevant evidence supporting his claim of self-defense at trial.

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The Wisconsin Supreme Court's opinion is reported at 2009 WI 69, ___ Wis. 2d ___, 767 N.W.2d 550. The opinion of the Wisconsin Court of Appeals is reported at 2008 WI App 118, 313 Wis. 2d 398, 756 N.W.2d 802. These opinions as well as the trial court's written order are reproduced in the appendix, along with the constitutional provisions involved.

JURISDICTION

On July 9, 2009 the Wisconsin Supreme Court rendered a decision reversing the Wisconsin Court of Appeals, re-writing and sustaining a trial court order for pre-trial disclosure of the substance of the defendant's potential testimony at trial. This decision creates a new court-made rule of criminal procedure for this and all similarly situated defendants in the State of Wisconsin that impacts their substantive constitutional rights. The statutory basis for this Court's jurisdiction is found in 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The defendant's Fifth Amendment right to remain silent, as well as his right to competent assistance of counsel and the right to present a defense as guaranteed by the Sixth and Fourteenth Amendments are at issue.

STATEMENT OF FACTS

This case arises from an altercation that occurred during the early morning hours of March 31, 2007 between defendant Jason McClaren and ex-convict Conrad Goehl at the McClaren residence. McClaren was originally charged with aggravated battery, and charges of first degree reckless injury and attempted first degree intentional homicide were added after preliminary hearing. The State has been aware of McClaren's claim of self-defense since the morning of the incident. Although not required by statute or case law to do so, the defense gave notice of intent to offer evidence of specific instances of Goehl's prior violent conduct at trial as going "to the reasonableness of the perceived threat Mr. Goehl posed to the defendant and the defendant's belief that force was necessary to terminate the interference with his person." The defense motion *in limine* providing notice of intent to offer this so-called ***McMorris*** [1] evidence was filed and served July 30, 2007.

The State's response was not filed or served until hours before the hearing held on October 2, 2007, and did not raise or address any requirement or request for pre-trial disclosure. At that hearing, the State stipulated that "a factual basis exists in the discovery materials for the defense to make the showing for perfect self-defense." The State further conceded the propriety of the defense request to

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[1] *McMorris v. State*, 58 Wis. 2d 144, 149-50 (1973).

admit testimony about Goehl's prior violent acts that McClaren was aware of at the time of the incident, whether through McClaren himself, or other witnesses.

The trial court initially ruled that the defense could introduce evidence of Goehl's prior violent conduct either through the defendant or other witnesses, as long as the defendant was aware of it at the time of the incident giving rise to the charges. Thereafter, when the trial court started to inquire specifically about what McClaren did or did not know at the time of said incident, defense counsel declined to get into trial strategy or reveal specifically what the defendant knew or did not know about Goehl's violent past. Only then did the State raise orally for the first time any claim to a right to pre-trial discovery of that information.

Defense counsel pointed out the absence of notice of this argument or authority for the State's contention, and objected to the pre-trial disclosure of the content of her client's mind:

> THE COURT: And the cases cited by the State. The State is saying basically: Judge, you don't have to do it, that's up to you, but if you want to do it you have that power.
>
> I'm asking you if I have that power or not, not whether I should or whether it's wise or that's what I would choose

> to do. I'm still at the first hurdle, which is, can I do that if I want to within the law.
>
> MS. HAPP: Right.
>
> I don't have 906.11 in front of me. It's not an issue that was raised or briefed or even referenced by the State. Certainly, the Court can conduct its courtroom and the witnesses as it sees fit.
>
> I think the defendant's constitutional right to present a defense precludes this Court from requiring him to disclose anything in his mind or his frame of mind other than what is already in the discovery in the taped interview. Period.
>
> 10/02/07 hearing transcript, p. 67.

At this point, the trial court engaged defense counsel in a series of hypotheticals designed to elicit a concession that it had the inherent authority to grant the State's discovery request. Defense counsel declined to concede.

> THE COURT: Well, that's true. Here is the question: Do I have the authority to order you to reveal the information pre-admissibility or not?

> MS. HAPP: I don't believe you do.
>
> THE COURT: Okay. Why not?
>
> MS. HAPP: Well, it all goes back to the same argument we're having.
>
> I don't think there's any statutory or case law that says that a defendant has to reveal what he intends to testify. Period. It's always subject to objection.
>
> 10/02/07 hearing transcript, p. 73, l. 14, *et seq.*; *see also*, p. 74, l. 13-19.

After failing to obtain the desired concession from defense counsel, the trial court nonetheless ordered the pre-trial disclosure requested by the State. The trial court's oral ruling paid lip service to reciprocity, acknowledging that its order was unlikely to impose any conceivable obligation upon the State. The written order from which the defendant took interlocutory appeal is not in any way reciprocal.

After granting leave for defendant's interlocutory appeal, the Wisconsin Court of Appeals reversed the trial court. Noting the complete absence of any statute or case law providing authority for the trial court's order, the Wisconsin Court of Appeals did not reach any of the

constitutional issues briefed by the parties. The State filed a Petition for Review, which the Wisconsin Supreme Court granted. In its brief before the Wisconsin Supreme Court, the State all but abandoned its argument that there was authority for the trial court's order, instead arguing in the alternative that the Wisconsin Supreme Court should depart from its own prior precedent and use this case to create such authority.

Analogizing the trial court's pre-trial order to the Notice of Alibi Statute at issue in *Williams v. Florida*, 399 U.S. 78 (1970), the Wisconsin Supreme Court reversed the Wisconsin Court of Appeals. The majority did so by combing the record to substantially re-write the trial court's order in a more sustainable form. As noted by the dissent, as the order the majority sustained was not the order from which defendant appealed, defendant's constitutional issues have not been fully addressed. This Court is now requested to grant a Writ of Certiorari to address these constitutional issues.

REASONS FOR GRANTING THE PETITION

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Case law and legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the government, not merely an evidentiary rule governing the work of the courts. *Chavez v. Martinez*, 538 U.S. 760, 791 (2003).

> "The Clause must provide more than mere assurance that a compelled statement will not be introduced against its declarant in a criminal trial. Otherwise there will be too little protection against the compulsion the Clause prohibits. The Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future."
>
> *Id.*

As noted in *Miranda v. Arizona*, 384 U.S. 436, 460 (1966), the Fifth Amendment privilege is fulfilled only "when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will."

The protection of the Fifth Amendment encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. *United States v. Hubbell*, 530 U.S. 27, 37 (2000). The Fifth Amendment privilege protects against any disclosures that a witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 445 (1972). The

accused in a criminal case is exempt from giving answers altogether, for they may disclose incriminating information that the suspect harbors. *Doe v. United States*, 487 U.S. 201, 214, n. 12 (1988).

As noted in *Doe*, *supra*, the privilege embodied in the Fifth Amendment is founded on our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 487 U.S. at 212. These policies are served when the privilege is asserted to spare a criminal defendant from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government. *Id.* at 213. The expression of the contents of an individual's mind fall squarely within the protection of the Fifth Amendment. *Fisher v. United States*, 425 U.S. 391, 420 (1976).

The disclosure order in this case requires McClaren to reveal evidence that will assist the State in developing its case, and force the defendant to "be a witness against himself." Specifically, the order will *a fortiori* require McClaren to disclose not just what he did know about Goehl's concededly violent past, but also what he was *not* aware of at the time of the incident. It is ironic that having spent so much

time and so many resources over the years keeping the public safe from Mr. Goehl, the State of Wisconsin has succeeded in obtaining an order forcing McClaren to reveal pre-trial the specific basis for his legitimate fear of Goehl, so that it can better prepare to downplay those fears at trial.

Under the terms of the trial court's disclosure order even as modified by the majority opinion rendered by the Wisconsin Supreme Court, McClaren will be forced to reveal his personal knowledge, thoughts, and frame of mind at the time of the alleged commission of the serious crimes with which he is charged in advance of trial. This would not be information freely given by the defendant, but compelled by the trial court's order, disclosed pre-trial under penalty of the potential exclusion of otherwise favorable and concededly relevant evidence if he does not comply. In order to preserve the possibility of using the *McMorris* evidence at trial, McClaren will be forced to disclose his thoughts even if, after exposure to the State's case, he chooses to exercise his right to remain silent at trial. Therefore, the order forces a disclosure of information that may otherwise never come to light, requiring him to assist the State in his own prosecution.

The majority opinion of the Wisconsin Supreme Court justifies this compelled pre-trial disclosure by analogizing the trial court's inherent authority to control the mode and order of the presentation of witnesses to Florida's Notice of

Alibi Statute held to be constitutional by this Court in *Williams v. Florida*, 399 U.S. 78 (1970). In that case, Justices Black and Douglas concurred in part and dissented in part, specifically noting that the majority reasoning in that case could be utilized to allow trial courts to compel the pre-trial disclosure of any information that a defendant might want to use at trial. This Court should accept review of this case to determine whether this extension of *Williams*, predicted by Justices Douglas and Black, is consistent with the Fifth Amendment.

Independently, the Sixth Amendment right to counsel includes the right to competent representation. *See McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). Tactical decisions, such as which witnesses or evidence to be offered when and in support of what legal proposition, are the province of counsel. Conversely, the decision on whether to testify or remain silent is a decision belonging solely to the defendant. *See, generally*, *State v. Albright*, 96 Wis. 2d 122, 291 N.W.2d 487 (1980). The trial court's order creates an irreconcilable tension between these distinct rights and responsibilities. It requires trial counsel to breach privilege and make pre-trial disclosures of the defendant's personal knowledge, unless trial counsel is prepared to make tactical sacrifices that may result in the exclusion of evidence negatively impacting the defendant's right to the competent assistance of counsel and the right to present a defense.

CONCLUSION

This Court should accept review of this case to determine the degree to which the State of Wisconsin can compromise these important Fifth and Sixth Amendment rights by extension of this Court's holding in Williams, *supra*, in the name of trial court efficiency.

Respectfully submitted,

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2009 WI 69

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2007AP2382-CR
(L.C. No. 2007CF144)

STATE OF WISCONSIN IN SUPREME COURT

State of Wisconsin,
Plaintiff-Respondent-Petitioner
v.

FILED
July 9, 2009

Jason L. McClaren,
Defendant-Appellant.

David R. Schanker
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

¶1 N. PATRICK CROOKS, J. This case concerns an interlocutory appeal before the court of appeals of a circuit court's pretrial order. The order permitted the defendant-appellant, Jason L. McClaren (McClaren), to introduce in connection with his claim of self-defense what is commonly referred to as "McMorris[1] evidence" — evidence of violent acts the victim had committed which McClaren knew about at the time of the alleged

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[1] McMorris v. State, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

crime, and which would bear on the reasonableness of the claim of self-defense — but only on the condition that he provide a summary of that evidence prior to trial so that the court could make a pretrial determination of its relevance and admissibility. McClaren objected to that requirement on the grounds that the court had no authority to require disclosure of such evidence and that doing so violated certain constitutional rights. He contended that the proper time to resolve concerns about admissibility would be after the testimony was elicited at trial and drew an objection. He sought and was granted review of the non-final order at the court of appeals.

¶2 The court of appeals, in a published decision, held that the circuit court's order exceeded its authority because neither Wis. Stat. § 971.23 (2005-06),[2] which sets forth limited pre-trial disclosure obligations for a defendant, nor Wis. Stat. § 906.11, which authorizes a court to exercise control over the presentation of evidence, extended to an order to provide McMorris evidence in advance of trial. State v. McClaren, 2008 WI App 118, 313 Wis. 2d 398, 756 N.W.2d 802. Because the court of appeals resolved the issue in favor of McClaren on statutory grounds, it did not reach McClaren's constitutional arguments.

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[2] All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

¶3 For the reasons stated below, we reverse the decision of the court of appeals. Wisconsin statutes provide the circuit court with the necessary authority for the order we consider here. Wis. Stat. §906.11 authorizes a judge to exercise control over the presentation of evidence so that the truth can be effectively ascertained and so that time will not be needlessly wasted. To hold otherwise could frustrate a circuit court's efforts to try to be certain that a jury is presented with admissible, reliable evidence and to make pretrial rulings so that the trial runs smoothly. The authority of a circuit court under Wis. Stat. § 906.11 fits within the broader context of a court's inherent powers "which must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions." City of Sun Prairie v. Davis, 226 Wis. 2d 738, 747, 595 N.W.2d 635 (1999) (citing State ex rel. Friedrich v. Dane County Cir. Ct., 192 Wis. 2d 16, 531 N.W.2d 32 (1995)). Foreseeing potential obstacles to a smoothly run trial and taking the necessary steps to avoid them is manifestly within the inherent power of a circuit court.

¶4 McClaren says that, in requiring him to tell prior to trial which instances of the victim's violent conduct he was aware of at the time of the incident, the order violates his Fifth Amendment rights to remain silent and not incriminate himself. He says the order also runs afoul of the Due Process Clause because it imposes no reciprocal obligations on the State. Finally, he argues that excluding evidence — the sanction the court stated would result

for his not complying with the order – would violate his Sixth Amendment right to present a defense.

¶5 There is no constitutional bar to the exercise of the circuit court's authority in this case. Ascertainment of the truth is the primary objective of a trial, and such an order serves that objective in a constitutionally permissible manner. Efficiency is a secondary objective of a trial, but where it can be attained with constitutionally permitted measures, it is highly desirable. The United States Supreme Court has, on more than one occasion, upheld measures that ensure fair play and efficient use of trial court time. Where, as here, the evidence to be disclosed is nothing more than what the defendant chooses and has indicated he will put on at trial, such an order does not invade constitutional protections under the Fifth Amendment. As the United States Supreme Court noted in an analogous case, the Constitution does not guarantee a criminal defendant the right to surprise the prosecutor. Williams v. Florida, 399 U.S. 78, 86 (1970) ("We decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense."). Nor does the order violate McClaren's constitutional rights to due process; United States Supreme Court case law holds that so long as disclosure requirements are equally imposed on both parties, there is no constitutional violation. Wardius v. Oregon, 412 U.S. 470 (1973).

¶6 A corollary to the question of the constitutionality of the order is the constitutionality of any sanctions available for a violation of the order. McClaren contends that exclusion of evidence is simply not an option. However, in Taylor v. Illinois, 484 U.S. 400 (1988), the United States Supreme Court set forth the appropriate analysis for such a violation and established that sanctions up to and including exclusion of evidence are permissible if warranted. It appears from the record that the circuit court intended to exclude from trial any evidence that McClaren attempted to offer at trial in violation of the order; we clarify here that while such a sanction may be permitted, lesser sanctions must be considered first, and that the extreme sanction of exclusion is permissible only after the circuit court has determined that the violation was "willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence," the test set forth in Taylor. Id. at 415.

¶7 We therefore reverse the decision of the court of appeals and remand to the circuit court for further proceedings.

I. BACKGROUND

¶8 McClaren spent a spring evening drinking with his wife's ex-boyfriend, Conrad Goehl (Goehl), and the night ended with an altercation — arising, ironically, from a discussion of anger management counseling — in which McClaren hit

Goehl with a pickaxe. When the police arrived at the scene, Goehl said he had been attacked without provocation; McClaren claimed self-defense. McClaren was charged with several crimes, including attempted first-degree intentional homicide. Prior to trial, which was scheduled to begin October 29, 2007, McClaren filed a motion in limine seeking a ruling on the admissibility of information about Goehl's extensive criminal record and time in prison, and evidence of his "dangerous character and prior acts of violence." A hearing was held on McClaren's motion on October 2, 2007, four weeks before the day of trial.

¶9 Following the hearing, the Jefferson County Circuit Court, the Honorable Randy R. Koschnick presiding, ruled that McClaren would be allowed to introduce evidence about Goehl's violent past but gave McClaren a pretrial deadline to disclose to the State and to the court the nature of the evidence he intended to introduce. The court required "a summary of all specific instances of the victim's violent conduct of which the defendant was aware and that the defendant intends to introduce at trial, including witnesses to such conduct and the date and place such conduct occurred." The record showed that Goehl had 11 prior convictions,[3] and the circuit court expressed concern about the length of a mid-trial hearing, outside the jury's presence, on the admissibility of evidence of this nature.

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[3] Of course, we note that the potential evidence of prior violent conduct could include conduct other than that which led to the convictions.

¶10 In its oral ruling, the circuit court imposed a reciprocal requirement that the State in turn provide a summary of any evidence it intended to use to rebut McClaren's McMorris evidence regarding Goehl.

¶11 Since the order was not appealable as of right, McClaren filed a petition for leave to appeal the order, pursuant to Wis. Stat. § 809.50, and the court of appeals granted the petition.

¶12 The court of appeals reversed. The court of appeals viewed the order, "in essence, as a discovery device," and thus centered its analysis on Wis. Stat. § 971.23, which addresses what evidence a prosecutor must disclose and what evidence a defendant must disclose. McClaren, 313 Wis. 2d 398, ¶25. Because that statute has nothing to say about McMorris evidence, the court held that the order exceeded the circuit court's authority; it found Wis. Stat. § 906.11 inapplicable and, because it found no statute or case that required such disclosure, held that the order was not permitted. Id. It cited this court's holding in State v. Miller, 35 Wis. 2d 454, 151 N.W.2d 157 (1967), that discovery in criminal cases was not a matter to be determined by case law but depended on statute or the rule-making process. Id., ¶14.

¶13 The State filed a petition with this court seeking review of the court of appeals' decision, and we granted review.

II. STANDARD OF REVIEW

¶14 This case involves questions of judicial authority, statutory interpretation, and constitutional issues, all of which are reviewed de novo. Custodian of Records for the LTSB v. State, 2004 WI 65, ¶6, 272 Wis. 2d 208, 680 N.W.2d 792; State v. Floyd, 2000 WI 14, ¶11, 232 Wis. 2d 767, 606 N.W.2d 155; In the interest of E.C., 130 Wis. 2d 376, 381 N.W.2d 72 (1986).

III. DISCUSSION

¶15 We begin by focusing on two things: the circumstances under which the order was made, and what evidence the order concerned.

¶16 This case was proceeding toward trial. The order McClaren challenges here arose at a hearing on a motion in limine brought by McClaren. He was seeking, among other things, for the circuit court to rule that testimony concerning Goehl's violent history would be admissible on the grounds that it was relevant to McClaren's state of mind.[4]

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[4] McClaren's motion in limine requested:

. . . . .

3. That the court make a ruling out of the presence of the jury regarding the admissibility of Conrad Goehl's criminal convictions, as well as specific finding as to the number of Mr. Goehl's criminal convictions.

4. That the Court make a ruling out of the presence of the jury regarding the admissibility of the type and factual basis for Mr. Goehl's convictions, as well as Mr. Goehl's

The discussion turned to what specific evidence McClaren wanted to admit. The court engaged counsel in extended discussion of the dilemma presented: how the court could control the evidence to ensure that the jury heard only that which was relevant, not cumulative and not unfairly prejudicial. Among Goehl's prior convictions, for example, was a conviction for sexual assault of a child, and the potential for that evidence to be submitted at trial raised multiple questions — its relevance to McClaren's state of mind (whether McClaren even knew about it), its relevance as to Goehl's violent character, and its highly prejudicial nature. Besides questions of admissibility there was also the question of how the State would be able to investigate and rebut evidence that was revealed for the first time at trial. The circuit court concluded that the impracticality of deciding these issues at trial precluded that option. The part of the written order relevant to this review was as follows:

> The defendant shall make written disclosure to the Court and the prosecution by the close of business on October 16, 2007, a summary of all specific instances of the victim's violent conduct of which the defendant was aware and that the defendant intends

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dangerous character and prior acts of violence, as they directly relate to the reasonableness of the perceived threat Mr. Goehl posed to the defendant and the defendant's belief that force was necessary to terminate the interference with his person by Mr. Goehl.

> to introduce at trial, including witnesses to such conduct and the date and place such conduct occurred. Such disclosure does not include acts of the victim referenced in the defendant's interrogation on March 31, 2007.

¶17 In the oral ruling made at the hearing, the circuit court further stated:

> The ruling is, if any party intends to introduce evidence concerning an act by Mr. Goehl which is not covered in the interview, police interview with the defendant, the offering party needs to provide written notice to the Court and the opposing party by close of business on October 12th as to the particular acts; and that includes the location, the time, the witnesses and the behavior, the witnesses that the party intends to call at trial concerning that particular act. That applies to both parties. I can't conceive of a situation right now where the State would have evidence that falls into this category, but they might[,] and the same ruling applies to both parties.

¶18 The court referred repeatedly to the fact that the ruling was based on its concern for

using jurors' time effectively and avoiding unfair prejudice to either party.[5]

¶19 As noted above, McClaren appealed the order on several grounds: first, that the circuit court was without authority for such an order; second, that it violated his Fifth Amendment right against self-incrimination and right to remain silent because it compelled him to provide to the circuit court and the State an account of what he knew at the time of the incident about Goehl's prior violent acts; third, that in conditioning the admissibility of testimony of defense witnesses on prior disclosure, the order violated his due process rights because it imposed no reciprocal obligation on the State; and fourth, for the same reason, the order violated his Sixth Amendment right to present a defense.[6]

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[5] For example, the court stated, "I'm not concerned about sanctions on [McClaren] so much as I am concerned about not, you know, misleading the jury, allowing evidence to come in that's not properly admissible; it's likely to be unfairly prejudicial." Later in the hearing, the court said, "I don't want to take time with the jury sitting here to be processing this information during the trial, and it could be a pretty lengthy hearing that's required depending on what it is we're talking about . . . . I don't want to end up in a situation where the jury is waiting in the jury room for two hours while I hear from three or four witnesses describing something allegedly done by Mr. Goehl . . . ."

[6] The Sixth Amendment provides as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

¶20 We examine each of his arguments in turn but first briefly summarize the law on evidence supporting a claim of self-defense.

¶21 It is well established that a defendant seeking to support a self-defense claim may attempt to "prov[e] prior specific instances of violence within [the defendant's] knowledge at the time of the incident." State v. Wenger, 225 Wis. 2d 495, 507, 593 N.W.2d 467 (Ct. App. 1999) (quoting McMorris v. State, 58 Wis. 2d 144, 152, 205 N.W.2d 559 (1973)); see also Wis. Stat. §§ 904.04 and 904.05(2). It is also well established that admissibility of evidence proffered to show the reasonableness of the self-defense claim is within the circuit court's discretion. State v. Head, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413. As with any "other acts evidence," the evidence is subject to the application of the balancing test involving the weighing of probative value against the danger of unfair prejudice, and considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See Wis. Stat. § 904.03. Assuming its probative value outweighs such considerations, we have in previous cases established the defendant's right to put on such evidence once a factual basis has been set forth for a self-defense claim, and also established the circuit court's responsibility to vet the evidence prior to admission to be sure it is valid McMorris evidence. See, e.g., McAllister v. State, 74 Wis. 2d 246, 246 N.W. 2d 511 (1976). The question before us in this case is primarily a question of timing: whether a circuit court has the authority to order a defendant

to disclose any planned McMorris evidence prior to trial, so that the factors involved in determining the evidence's admissibility can be weighed not only prior to admission, but also prior to trial.

A. Authority for the order

¶22 McClaren argues that this court in Miller limited a court's authority to order disclosure of evidence in a criminal case to what is permitted by statute. In Miller this court noted, "If we are to adopt a pretrial discovery procedure in criminal cases in this state we deem it would be best done by a rule of court or by legislative action rather than on a case to case basis by the court." Miller, 35 Wis. at 478. Finding no authority for the disclosure of McMorris evidence in Wis. Stat. § 971.23, which lists what parties in a criminal case are required to disclose, he argues that the inquiry is ended.

¶23 The State gleans statutory authority for a circuit court to order disclosure of pretrial McMorris evidence from reading together Wis. Stat. §§ 906.11 and 901.04(3)(d). Those statutes authorize a court to exercise reasonable control over the presentation of evidence and provide for hearings to be held outside the presence of the jury for "[a]ny preliminary matter if the interests of justice so requires." § 901.04(3)(d).

¶24 We do not view this case as presenting the kind of discovery question Miller was

addressing.[7] One significant difference is that the evidence covered by the order is nothing more than evidence that the party chooses to submit. The order is, in essence, compelling advance notice of whatever McMorris evidence McClaren decides to offer solely for the legitimate purpose of establishing its admissibility in advance of trial.

¶25 Here, the evidence in question presents the potential for multiple delays in the trial, if it is not resolved in advance of trial. The rule McClaren advocates, which would render disclosure of any McMorris evidence impermissible until such time as the defendant chose to disclose it, could force not just one, but many mid-trial delays. Under his approach, the court may not force him to disclose, even after the trial is underway, all of the specific acts at once; his argument is that any forced disclosure before the point at which he seeks to admit the evidence runs afoul of the Constitution.[8] Multiple continuances while the State investigates each incident and multiple hearings outside of the presence of the jury are a distinct possibility on the facts of this case: 11 prior convictions of the victim, Goehl, are known; the number of incidents of prior violent conduct that did

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[7] We do note, however, that State v. Miller, 35 Wis. 2d 454, 151 N.W.2d 157 (1967), which was decided in 1967, predated both Wis. Stat. § 906.11, which gives a court broad powers to control the presentation of evidence, and Wis. Stat. § 971.23, which imposes disclosure requirements on both the State and criminal defendants. Those statutes were adopted in 1973.

[8] At the motion hearing, McClaren's counsel said any evidence he would attempt to admit is "subject to objection" and would be dealt with at that moment in the trial.

not result in conviction is unknown. Such an approach puts the control of the trial in the hands of the defendant rather than the court and introduces unnecessary uncertainty into an otherwise predictable trial process. With no basis for an estimate of how long the trial will run, a judge would be unable to balance other calendar demands and unable to tell potential jurors during jury selection how long the trial is expected to least.

26 Given the limited nature of the evidence covered in this order — that is, the requirement that McClaren give notice of the specific McMorris evidence he wants to introduce and which he was aware of on the night of the incident — this order fits comfortably into Wis. Stat. § 906.11's description of the court's sphere of control. The court is, in fact, required to "exercise reasonable control" over the "present[ation of] evidence" so that it can be done effectively and with minimal wasted time. See State v. Wallerman, 203 Wis. 2d 158, 168, 552 N.W.2d 128 (Ct. App. 1996). Both concerns were specifically mentioned by the circuit court with regard to this order. This is precisely the type of admissibility of evidence questions that circuit courts should be attempting to resolve in advance of trial.[9]

¶27 The United States Supreme Court has upheld a law requiring pre-trial notice of an alibi

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[9] For example, evidence the prosecution wishes to introduce against the defendant under Wis. Stat. § 904.04(1)(b) and (2) is handled in a similar fashion. See State v. Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

defense along with the specific location where the defendant claims to have been and names and addresses of alibi witnesses.[10] Like such a law, this order merely moves the notification of the intent to introduce evidence from the heat of the trial to the relative calm of a pre-trial motion hearing. It enables more effective presentation of evidence, avoids needless waste of time while a jury is waiting, and gives a circuit judge the time to consider all the arguments and research the case law prior to making a ruling.[11]

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[10] Williams v. Florida, 399 U.S. 78 (1970).

[11] In State v. Wright, the court of appeals noted the common use of pretrial rulings in Wisconsin and other jurisdictions and noted that they are favored in a variety of circumstances:

> While the following list is not exhaustive, we view a motion in limine as proper where (1) the trial court has directed that the evidentiary issue be resolved before trial; (2) the evidentiary material is highly prejudicial or inflammatory and would risk a mistrial if not previously addressed by the trial court; (3) the evidentiary issue is significant and unresolved under existing law; (4) the evidentiary issue involves a significant number of witnesses or a substantial volume of material making it more economical to have the issue resolved in advance of trial so as to save the time and resources of all concerned; or (5) a party does not wish to object to the evidence in the presence of the jury and thereby preserves the issue for appellate review by obtaining an unfavorable ruling via a pretrial motion in limine[.]

State v. Wright, 2003 WI App 252, ¶40, 268 Wis. 2d 694, 673 N.W.2d 386 (citations omitted).

¶28 Under the circumstances presented here, where McClaren seeks to introduce McMorris evidence in support of a self-defense claim, the circuit court has the authority under Wis. Stat. § 906.11, in conjunction with Wis. Stat. § 901.04(3)(d), to order the defendant to disclose prior to trial any specific acts that he knew about at the time of the incident and that he intends to offer as evidence so that admissibility determinations can be made prior to trial.

¶29 The United States Supreme Court's discussion of limitations on the defendant in presenting his or her evidence when the defendant pleases closely tracks the logic of Wis. Stat. § 906.11. The linchpins of a fair trial are the "orderly presentation of facts" and "a fair opportunity" for each party to prepare evidence and rebuttal evidence. Taylor, 484 U.S. at 411.

¶30 In Taylor, a case concerning a violation of a rule requiring advance notice of witnesses, the United States Supreme Court said:

> The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a

> fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony.

Id. at 410-411. (emphasis added).

¶31 The Supreme Court noted as well: "In the exercise of [the right to present witnesses], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Taylor, 484 U.S. at 411 n. 15 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

¶32. The order in this case did nothing more than what was found permissible in the Taylor case: it was a procedure related to a rule of evidence designed to assure fairness.

B. Constitutionality of the order.

¶33 McClaren further argues that the order violates his rights against compelled self-incrimination under the Fifth Amendment of the United States Constitution. In essence, he argues, he is being compelled to provide the State, prior to trial, with what he knew about Gochl's violent character and when he knew it, even though he

could ultimately choose at the close of the State's case not to testify.

¶34 The State argues that no constitutionally protected right is violated because the order concerns only what McClaren chooses to disclose[12] and merely accelerates the disclosure of information that would be presented at trial.

¶35 In ruling that a defendant could be required to give notice of an alibi defense prior to trial, a defense analogous to self-defense, the United States Supreme Court said:

> Petitioner concedes that absent the notice-of-alibi rule the Constitution would raise no bar to the court's granting the State a continuance at trial on the ground of surprise as soon as the alibi witness is called. Nor would there be self-incrimination problems if, during that continuance, the State was permitted to do precisely what it did here prior to trial: take the

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[12] Any concerns that a defendant has concerning the disclosure potentially being used by the prosecutor in the case-in-chief could be addressed by an in camera review by the circuit court. Such a mechanism has been endorsed by the United States Supreme Court as a fair way of resolving disclosure disputes. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (finding that both the defendant's and the State's interest "in ensuring a fair trial can be protected fully by requiring that the [the evidence being sought] be submitted only to the trial court for in camera review" prior to a ruling on disclosure).

> deposition of the witness and find rebuttal evidence. But if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely the same result may be accomplished through pretrial discovery, as it was here, avoiding the necessity of a disrupted trial. We decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense.

Williams, 399 U.S. at 85 (emphasis added). The same rationale supports our conclusion here.

¶36 McClaren also argues that the order is constitutionally deficient because its lack of reciprocity violates the requirement of the Fourteenth Amendment's Due Process Clause. The United States Supreme Court struck down a criminal statute in Wardius that required a defendant to disclose an alibi defense without requiring reciprocal disclosure by the state of its rebuttal evidence. Wardius, 412 U.S. 470. McClaren argues that the order presented here is equally deficient; the only way it could be made reciprocal is for the prosecutor to be ordered to disclose "all corroborating evidence of the alleged victim's concededly violent past implicated by the defendant's forced pre-trial disclosures, including the names of

any additional witnesses to prior violent acts engaged in by the alleged victim."

¶37 A careful comparison of Wardius and the oral ruling of the circuit court in this case shows that the flaw present in Wardius was not present here. The statute at issue in Wardius contained no guarantee of disclosure of rebuttal evidence to the defendant. The Court stated that "[a]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and accuser." Wardius, 412 U.S. at 474 (citation omitted). The Court went on to say:

> The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Id. at 475-76.

¶38 Here the circuit court's oral ruling made more clear than the written order that

reciprocity was absolutely required. The circuit court said:

> So what I have in mind is that the deadline for filing the written materials would be the 12th . . . . That would apply to the State and to the defense. If the State has evidence that would fall into the category of acts not covered in the police interview which are relevant to self-defense or the lack thereof, those acts would be covered as well for the same reasons.
> (Emphasis added.)

¶39 It might have been more clear had the court explicitly called the evidence showing a lack of self-defense rebuttal evidence, but in any case, the court was explicit that its order applied to both parties.

C. Constitutionality of the potential sanction.

¶40 A conclusion that the circuit court has authority to issue such an order necessarily brings us to the question of the authority to enforce such an order.

¶41 McClaren says that excluding evidence as a sanction for violating the court's order is impermissible because it would violate his constitutional right to present witnesses, and thus to

present a defense, under the Sixth Amendment's compulsory process clause.[13]

¶42 The State contends that such a sanction may be permitted depending on the facts and that Taylor controls the sanction for any violations. Taylor upheld an Illinois court's refusal to allow testimony from a defense witness whose name was not disclosed prior to trial. The Court rejected the defendant's assertion that excluding evidence was never a permissible sanction and established a framework for analyzing violations. Taylor, 484 U.S. at 412-13.

¶43 We agree with the State. The United States Supreme Court has established a test for excluding evidence and has said that under certain circumstances, exclusion of evidence does not violate a defendant's constitutional rights. There are sanctions short of excluding evidence, of course. The Court cited a case, for example, that "[gave] consideration to the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." Taylor, 484 U.S. at 415 n.19 (citing Fendler v. Goldsmith, 728 F.2d 1181 (9th Cir.

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[13] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." U.S. Const. amend. VI In Washington v. Texas, 388 U.S. 14 (1967), the United States Supreme Court held that this right applies in state prosecutions.

1983)). However, as Taylor makes clear, even the sanction of excluding evidence against a defendant is constitutionally permissible in certain cases, such as where there have been willful violations "motivated by a desire to obtain a tactical advantage." Taylor, 484 U.S. at 415.

¶44 As we noted above, Taylor states well the balancing of interests that goes into a court's oversight of a trial:

> It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

Id. at 414-415 (emphasis added).

¶45 Whether a violation merits the extreme sanction of exclusion must be determined by a circuit court after a violation has occurred, and under the

parameters set forth by the United States Supreme Court in Taylor.

¶46 Here the circuit court noted in its oral ruling that, "As always, if new evidence is discovered at the last minute that may be the basis for an exception to the notice requirement." The circuit court should have been more clear that the Taylor analysis would be applied and that exclusion was one of the sanctions available to the circuit court for a violation of its order; it was premature for the circuit court, in its oral ruling, to predict that the sanction for failure to abide by the order would necessarily be the exclusion of evidence.

IV. CONCLUSION

¶47 For the reasons stated, we reverse the decision of the court of appeals. Wisconsin statutes provide the circuit court with the necessary authority for the order we consider here. Wis. Stat. § 906.11 authorizes a judge to exercise control over the presentation of evidence so that the truth can be effectively ascertained and so that time will not be needlessly wasted. To hold otherwise could frustrate a circuit court's efforts to try to be certain that a jury is presented with admissible, reliable evidence and to make pretrial rulings so that the trial runs smoothly. The authority of a circuit court under Wis. Stat. § 906.11 fits within the broader context of a court's inherent powers "which must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions."

Davis, 226 Wis. 2d at 747. Foreseeing potential obstacles to a smoothly run trial and taking the necessary steps to avoid them is manifestly within the inherent power of a circuit court.

¶48 McClaren says that, in requiring him to tell prior to trial which instances of Goehl's violent conduct he was aware of at the time of the incident, the order violates his Fifth Amendment rights to remain silent and not incriminate himself. He says the order also runs afoul of the Due Process Clause because it imposes no reciprocal obligations on the State. Finally, he argues that excluding evidence — the sanction the court stated would result for his not complying with the order — would violate his Sixth Amendment right to present a defense.

¶49 There is no constitutional bar to the exercise of the circuit court's authority in this case. Ascertainment of the truth is the primary objective of a trial, and such an order serves that objective in a constitutionally permissible manner. Efficiency is a secondary objective of a trial, but where it can be attained with constitutionally permitted measures, it is highly desirable. The United States Supreme Court has, on more than one occasion, upheld measures that ensure fair play and efficient use of trial court time. Where, as here, the evidence to be disclosed is nothing more than what the defendant chooses and has indicated he will put on at trial, such an order does not invade constitutional protections under the Fifth Amendment. As the United States Supreme Court noted in an analogous

case, the Constitution does not guarantee a criminal defendant the right to surprise the prosecutor. Nor does the order violate McClaren's constitutional rights to due process; United States Supreme Court case law holds that so long as disclosure requirements are equally imposed on both parties, there is no constitutional violation.

¶50 A corollary to the question of the constitutionality of the order is the constitutionality of any sanctions available for a violation of the order. McClaren contends that exclusion of evidence is simply not an option. However, in Taylor, the United States Supreme Court sets forth the appropriate analysis for such a violation and establishes that sanctions up to and including exclusion of evidence are permissible if warranted. It appears from the record that the circuit court intended to exclude from trial any evidence that McClaren attempted to offer at trial in violation of the order; we clarify here that while such a sanction may be permitted, lesser sanctions must be considered first, and that the extreme sanction of exclusion is permissible only after the circuit court has determined that the violation was "willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence," the test set forth in Taylor.

¶51 We therefore reverse the decision of the court of appeals and remand to the circuit court for further proceedings.

By the Court.— The decision of the court of appeals is reversed, and the cause is remanded to the circuit court.

¶52 SHIRLEY J. ABRAHAMSON, C.J., did not participate.

¶53 ANN WALSH BRADLEY, J. (*dissenting*). There is a name for mandatory pretrial disclosure of information that might be offered as evidence in a criminal proceeding: discovery. Although the majority attempts to label what is at issue in this case as merely the pretrial disclosure of information, I agree with a unanimous court of appeals that the order here "in essence, [is] a discovery device." State v. McClaren, 2008 WI App 118, ¶25, 313 Wis. 2d 398, 756 N.W.2d 802.

¶54 Our precedent is clear that discovery is governed by the criminal discovery statute, Wis. Stat. § 971.23. Lynch v. County Court, 82 Wis. 2d 454, 466, 262 N.W.2d 773 (1978) (citing State v. Miller, 35 Wis. 2d 454, 478, 151 N.W.2d 157 (1967)). If a certain type of evidence is not enumerated in the statute, then mandatory disclosure is not authorized.

¶55 The majority departs from this precedent. Realizing that the discovery statute does not require pretrial disclosure of McMorris[1] evidence, the majority ultimately turns to the inherent powers of the court. See majority op., ¶3.

¶56 By relying on inherent authority, the majority opens wide the gates of pretrial discovery in criminal cases. Its rationale and holding stretch far beyond the disclosure of McMorris evidence. Instead, the majority rests on an unlimited pronouncement that covers the pretrial disclosure of

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[1] McMorris v. State, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

any information that might aid in ensuring a smoothly run trial: "Foreseeing potential obstacles to a smoothly run trial and taking the necessary steps to avoid them is manifestly within the inherent power of a circuit court." Majority op., ¶3.

¶57 I agree instead with the court of appeals that "the court's general authority under Wis. Stat. §901.11 to exercise control over the mode and order of presenting evidence cannot be read to permit it to require pretrial discovery that it would otherwise not be permitted to require under [the criminal discovery statute]." McClaren, 313 Wis. 2d 398, ¶1. Although I share the majority's concern for the efficient and fair administration of a trial, I believe that any revision in the law should be brought about by legislative change and not by a resort to inherent authority of the court.[2] Accordingly, I respectfully dissent.

I

¶58 In this case, the circuit court ordered the defendant to provide "a summary of all specific instances of the victim's violent conduct of which the defendant was aware and that the defendant intends to introduce at trial, including witnesses to such conduct and the date and place such conduct

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[2] Because I conclude that the circuit court did not have the authority to enter the order, I need not address McClaren's constitutional arguments.

occurred."[3] The court of appeals determined that the order for disclosure was governed by the discovery statute. Finding no authority in the statute for the order, it reversed the circuit court.

¶59 The majority, however, asserts that this is not a discovery case. Majority op., ¶24. Although it attempts to tie its analysis to evidentiary statutes, its conclusion is based on inherent

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[3] See majority op., ¶16. Throughout the opinion, the majority focuses on the court's oral ruling rather than focusing on the unilateral nature of the written order. See majority op., ¶¶ 10, 17, 37, 38. This focus is misguided. Appeal is taken from a written order or judgment. State ex rel. Hildebrand v. Kegu, 59 Wis. 2d 215, 216, 207 N.W.2d 658 (1973); Estate of Jackson v. Gray, 212 Wis. 2d 436, 442, 569 N.W.2d 467 (Ct. App. 1997).

As a result, the majority does not squarely address McClaren's constitutional arguments. The majority correctly sets forth the due process principle that disclosure requirements must be reciprocal: "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." Majority op., ¶37 (quoting Wardius v. Oregon, 412 U.S. 470, 476 (1973).

Nevertheless, the circuit court's written ruling required only the defendant to disclose information. See majority op., ¶16 ("The defendant shall make written disclosure to the Court and the prosecution . . . .") The court's written order imposed no reciprocal disclosure requirement upon the State. See Id. In fact, it posed no requirement on the State at all.

Given that the circuit court's order lacked reciprocity, it is unclear to me how the majority can affirm this constitutionally deficient written order.

authority: "Foreseeing potential obstacles to a smoothly run trial, and taking the necessary steps to avoid them, is manifestly within the inherent power of a circuit court." Id., ¶3.

¶60 Our cases have established that compelled pretrial disclosure of evidence by any other name is still governed by the discovery rules. State v. Schaefer, 2008 WI 25, 308 Wis. 3d 279, 746 N.W.2d 457. In Schaefer, the defendant filed a subpoena to obtain police reports before the preliminary examination. Id., ¶1.

¶61 We stated, "This is a discovery case, notwithstanding the defendant's protestations to the contrary." Id., ¶18. We determined that the subpoena should be quashed because "the scope of discoverable materials is set out in statute and compliance with the statute will be enforced by the court." Id., ¶77 n.17. The lesson from Schaefer is clear. If something looks like discovery, it is governed by the discovery statute.

¶62 The policy reasons advanced by the majority for allowing the court to compel the production of McMorris evidence are based on the rationale underlying discovery. The majority explains, "Besides questions of admissibility[4] there

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[4] The majority acknowledges that a court can satisfy its responsibility to vet McMorris evidence prior to its admission, even if the evidence is not produced prior to trial. See majority op., ¶21: "The question before us in this case is primarily a question of timing: whether a circuit court has the authority to order a defendant to disclose any planned McMorris evidence

was also the question of how the State would be able to investigate and rebut evidence that was revealed for the first time at trial." Majority op., ¶16.

¶63 This is a general discovery rationale. The purpose of discovery is to promote "the ascertainment of the truth and ultimate disposition of the lawsuit in accordance therewith[.]" Monier v. Chamberlain, 221 N.W.2d 410, 417 (Ill. 1966). Through discovery, mutual knowledge of all the relevant facts will be achieved. See Hickman v. Taylor, 329 U.S. 495, 507 (1947).

¶64 In addition to relying upon a discovery rationale, the majority cites to criminal discovery cases. It relies primarily upon three United States Supreme Court opinions: Williams v. Florida, 399 U.S. 78 (1970); Wardius v. Oregon, 412 U.S. 470 (1973); and Taylor v. Illinois, 484 U.S. 400 (1988). In all three cases, the issue before the Court was the constitutionality of a discovery rule.

¶65 The majority asserts that Williams is "analogous" to this case. Majority op., ¶5. In Williams, the Florida Rules of Criminal Procedure required a criminal defendant to provide notice of an alibi defense or risk discovery sanctions.[5] The Court

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prior to trial, so that the factors involved in determining the evidence's admissibility can be weighed not only prior to admission, but also prior to trial."

[5] See Fla. Rule Crim., Proc. 1.200, reprinted in Williams v. Florida, 399 U.S. 78, 104 (1970) (appendix to opinion of the Court) ("[A] defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days

said, "Florida's notice-of-alibi rule is in essence a requirement that a defendant submit to a limited form of pretrial discovery by the State whenever he intends to rely at trial on the defense of alibi." 399 U.S. at 80.

¶66 The second case relied upon by the majority, Wardius, addressed a similar state rule.[6] At the outset of the opinion, the Court framed the issue as follows: "This case involves important questions concerning the right of a defendant forced to comply with a 'notice-of-alibi' rule to reciprocal discovery." 412 U.S. at 471. The Court commented: "nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve the [ ] goals" of reducing surprise

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before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi.")

Wisconsin has a similar rule, which is enumerated in the criminal discovery statute, Wis. Stat. § 971.23(8).

[6] See Or. Rev. Stat. § 135.875 (1973) ("If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, . . . file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence.").

and enhancing the fairness of a criminal trial. Id. at 474.

¶67 The third case, Taylor, is also a discovery case. There, the trial court excluded a witness's testimony because the defendant "fail[ed] to identify [the] defense witness in response to a pretrial discovery request."[7] 484 U.S. at 401. The question before the Court was whether "the Sixth Amendment bars a court from ever ordering the preclusion of defense evidence as a sanction for violating a discovery rule." Id. at 406. The Court concluded that the Constitution did not create an absolute bar to discovery sanctions.

¶68 The majority relies on the analysis of these cases, yet it denies that the issue presented here is a discovery issue, governed by the discovery statute: "We do not view this case as presenting the kind of discovery question [other cases were] addressing." Majority op., ¶24.

¶69 To the contrary, I conclude that the issue presented to this court is squarely a discovery issue, and it is governed by the discovery statute.

II

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[7] The Illinois Supreme Court Rules require a defendant to disclose a list of witnesses that he intends to call at trial. This rule is one of several enumerated under the heading "Discovery." Illinois Supreme Court Rules, Article IV: Rules on Criminal Proceedings in the Trial Court, Part B. Discovery, Rule 413: Disclosure to Prosecution.

¶70 We have long held that there is no general right to discovery in criminal cases and that the court should not order discovery on a case-by-case basis:

> Wisconsin does not recognize a right [of a] defendant to a pretrial discovery of the prosecution's evidence. If we are to adopt a pretrial discovery procedure in criminal cases in this state we deem it would be best done by a rule of court or by legislative action rather than on a case to case basis by the court.

Miller, 35 Wis. 2d at 478.

¶71 Subsequent to Miller, the legislature adopted a comprehensive system of rules governing criminal discovery. See Wis. Stat. § 971.23. After its enactment, Wisconsin courts affirmed the principle that pretrial discovery is prescribed by the statute. See, e.g., Lynch, 82 Wis. 2d at 466 (vacating a court's order permitting a defendant to examine the State's files because it "would operate, in essence, as a discovery device, and would therefore be inconsistent with [the] principle" that "discovery procedures should be determined by statute or by rule of court").

¶72 The criminal discovery statute provides limited and reciprocal discovery requirements. Upon demand, a defendant "must disclose" the following: (1) a list of the names and addresses of witnesses the defendant intends to call at trial; (2) relevant written or recorded statements of the named witnesses

including expert reports that the defendant intends to produce at trial; (3) the criminal records of the named witnesses; and (4) physical evidence the defendant intends to produce at trial. Wis. Stat. §971.23(2m). McMorris evidence is not on the list.

¶73 Aside from the mandatory disclosures enumerated above, "[o]ur discovery statute does not require a defendant to divulge the details of his or her own case." State v. Konkol, 2002 WI App 174, ¶17, 256 Wis. 2d 725, 649 N.W.2d 300. The statute provides just one exception to this rule. If the defendant wishes to present an alibi defense, "the defendant shall give notice to the district attorney . . . stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known." Wis. Stat. § 971.23(8)(a).

¶74 On the issue of notice of self-defense and disclosure of McMorris evidence, however, the statute is silent. Therefore, under the principle stated in Miller and reaffirmed in Lynch, notice and disclosure of this evidence is simply not required.

¶75 Finding no authority in the statute for the compelled pretrial disclosure of McMorris evidence, I determine that the court was without authority to enter the order. The court of appeals got it right when it determined that a circuit court's authority to exercise control over the mode and order of presenting evidence does not provide the authority to require pretrial discovery that it would otherwise

not be permitted to require under the Wisconsin criminal discovery statute. See McClaren, 313 Wis. 2d 398, ¶1.

III

¶76 Today, the majority permits a circuit court to compel pretrial disclosure of any manner of evidence, citing the court's inherent authority to take the necessary steps to avoid potential obstacles to a smoothly run trial. See majority op., ¶3. The majority's attempt to fit a discovery issue into an inherent authority box has broad implications.

¶77 A court may exercise its inherent authority to ensure "that the court functions efficiently and effectively to provide the fair administration of justice." City of Sun Prairie v. Davis, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999). However, invoking inherent powers in order to trump legislatively enacted public policy should be a last resort. See Id. at 755.

¶78 Here, the legislature has made policy choices regarding the evidence that is subject to compulsory pretrial disclosure. It permits compulsory pretrial disclosure of certain types of evidence, including alibi evidence, but it is silent about McMorris evidence. Nevertheless, the majority permits a circuit court to circumvent these legislative policy choices by invoking the court's inherent authority to ensure that it functions effectively and efficiently to provide for the fair administration of justice.

¶79 I acknowledge that McMorris evidence may pose special difficulties for the court. Perhaps the rationale underlying the statutory notice-of-alibi requirement applies to McMorris evidence as well. There may be good policy reasons for a rule requiring pretrial discovery of this type of evidence. If so, however, it would be preferable for the legislature to promulgate a new rule. The advantage of a rule, rather than an opinion justified on the basis of the court's inherent authority, is that it could be strictly limited to this type of evidence.

¶80 The majority attempts to limit its holding to cases involving similar facts: "Under the circumstances presented here, where McClaren seeks to introduce McMorris evidence in support of a self-defense claim, the circuit court has the authority" to order pretrial disclosure of the evidence. See majority op., ¶28. However, the majority's attempt to narrow the scope of its holding is undermined by its invocation of the court's broad inherent powers. Consequently, neither its rationale nor its holding is limited to McMorris evidence.

¶81 For the above stated reasons, I respectfully dissent.

COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62

Appeal No. 2007AP2382-CR Cir. Ct. No. 2007CF144

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

JASON L. McCLAREN,
DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Reversed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 BRIDGE, J. Jason McClaren is charged with aggravated battery, attempted first-degree intentional homicide and first-degree reckless injury. The State has conceded that a factual basis exists for him to raise a claim of perfect self-defense. He appeals the circuit court's pretrial order requiring him to disclose, prior to trial, a summary of the evidence he intends to offer in furtherance of his defense regarding what he believed to be the violent character of the victim. In particular, the order requires disclosure of a summary of all specific instances of the victim's violent conduct of which McClaren is aware and intends to introduce at trial, including witnesses to the conduct and the relevant dates and locations of the conduct. We conclude that under the rule articulated in *State v. Miller*, 35 Wis. 2d 454, 478, 151 N.W.2d 157 (1967), the circuit court's order exceeds its authority under WIS. STAT. §971.23(2m) (2005-06)[1] governing pretrial discovery in criminal matters. We also conclude that the court's general authority under WIS. STAT. § 906.11 to exercise control over the mode and order of presenting evidence cannot be read to permit it to require pretrial discovery that it would otherwise not be permitted to require under §971.23(2m) and the rule in *Miller*. Accordingly, we reverse the circuit court's order.

BACKGROUND

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶2 Jason McClaren is charged with aggravated battery by use of a dangerous weapon in violation of WIS. STAT. §§ 940.19(5) and 939.63(1)(b); attempted first-degree intentional homicide in violation of WIS. STAT. §§ 940.01(1)(a) and 939.32; and first-degree reckless injury in violation of WIS. STAT. § 940.23(1)(a). The charges stem from allegations that while inside the garage of McClaren's residence, McClaren struck Conrad Goehl in the neck with a pack axe. In a videotaped statement, McClaren told police that he knew that Goehl had a violent character and had been "in and out of prison."

¶3 By pretrial motion in limine, McClaren sought a ruling regarding the admissibility of evidence of Goehl's dangerous character and prior acts of violence as they related to McClaren's claim of self-defense. At the hearing on the motion, the State conceded that there was a factual basis to raise a claim of perfect self-defense[2] and did not oppose the motion as long as the evidence was not unfairly duplicative. Goehl's criminal record includes eleven prior convictions. McClaren's witness list contains the names and addresses of six witnesses, in addition to the witnesses named in the prosecutor's witness list.

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[2] Perfect self-defense gives the jury a basis to find a defendant not guilty. *See State v. Head*, 2002 WI 99, ¶2, 255 Wis. 2d 194, 648 N.W.2d 413.

¶4 During the motion hearing, the circuit court rules that evidence of any specific alleged prior acts of Goehl's violence that McClaren mentioned to police in the videotaped interview would be admissible at trial without McClaren providing any further description of those alleged acts. The court went on, however, to express concern about additional evidence of McClaren's knowledge of Goehl's violent behavior that would come in through witness testimony, and whether McClaren would attempt to present evidence that may not be admissible and would unduly influence the jury. For example, the court referenced the fact that Goehl had one felony conviction for the sexual assault of a child, and observed that this particular offense may or may not be relevant to McClaren's self-defense claim. The court noted that such evidence may have an unfairly prejudicial effect on the State's case once the jury heard of it, and that it would be "a bell that would be difficult to unring." Defense counsel indicated that she did not intend to introduce evidence about this particular offense, but the court observed that there may be similar issues regarding Goehl's other offenses. The court continued to voice concern about the danger of unfair prejudice if the details emerged for the first time at trial before the court could rule on admissibility.

¶5 The court also indicated that it did not wish to take the time to hear offers of proof outside of the jury's presence when and if McClaren attempted to introduce such evidence and drew objections from the State. The court concluded:

So, I'm not requiring the defense to submit anything if it doesn't want to, but I am prohibiting the defense from referring to any alleged conduct by Mr. Goehl that falls under this category without a pretrial ruling.

I don't want to take time with the jury sitting here to be processing this information during the trial, and it could be a pretty lengthy hearing that's required depending on what it is we're talking about.

I don't know what we're talking about, because it hasn't been revealed. I don't want to end up in a situation where the jury is waiting in the jury room for two hours while I hear from three or four witnesses describing something allegedly done by Mr. Goehl that's not covered in the police [videotaped] interview [of McClaren].

So, in order to ensure that the trial proceeds in an orderly manner and that I am allowed to take reasonable steps to avoid unfair prejudice to both parties, I will require that any party who wishes to offer such evidence present the details in writing to the

> Court and to the opposing party before trial.

¶6 In its written pretrial order, the court ruled that McClaren must provide the State, before trial, with "a [written] summary of all specific instances of the victim's violent conduct of which the defendant was aware and that the defendant intends to introduce at trial, including witnesses to such conduct and the date and place such conduct occurred." The order provided further that this requirement did not apply to the instances of violent conduct which were referenced in McClaren's statement to police.

¶7 McClaren sought leave to appeal the court's pretrial order. We granted interlocutory review and stayed further proceedings in the circuit court pending resolution of this appeal.

STANDARD OF REVIEW

¶8 The question of judicial authority is an issue of law which we review de novo. *Breier v. E.C.*, 130 Wis. 2d 376, 381, 387 N.W.2d 72 (1986).

DISCUSSION

¶9 In *McMorris v. State*, 58 Wis. 2d 144, 152, 205 N.W.2d 559 (1973), the supreme court held that:

> When the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident.

¶10 A defendant's proof of alleged prior violent acts of the victim is not limited to the defendant's own testimony; within the trial court's discretion, the defendant may produce supporting evidence to prove that the acts of which the defendant claims knowledge actually occurred. ***State v. Wenger***, 225 Wis. 2d 495, 508, 593 N.W.2d 467 (Ct. App. 1999). The court may exclude the evidence "if its 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" ***State v. Head***, 2002 WI 99, ¶129, 255 Wis. 2d 194, 648 N.W.2d 413.

¶11 The issue before us is whether McClaren may be compelled to provide a summary of his proffered ***McMorris*** evidence prior to trial.

¶12 McClaren argues that to require pretrial disclosure of this evidence would violate his state and federal constitutional right to freedom

from compelled self-incrimination. The self-incrimination clause of the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution provide that no person may be compelled in any criminal case to be a witness against himself. The privilege against self-incrimination protects a defendant from "being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 761 (1966).

¶13 McClaren also argues that the court's threatened sanction of excluding evidence of any of Goehl's past violent acts and the witnesses thereto if McClaren does not provide the required summary would violate his constitutional rights to present a defense and to due process. The right to present a defense is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution and includes the right to present the testimony of favorable witnesses.

¶14 Although the majority of the parties' arguments concern whether the required disclosure violates these constitutional rights, our analysis begins instead with a consideration of Wisconsin's criminal discovery statute. In *Miller*, 35 Wis. 2d at 478, which was decided before Wisconsin's criminal discovery statute was enacted, the supreme court determined that there is no general right to

discovery in criminal cases except as provided by statute. *See also* ***Wold v. State***, 57 Wis. 2d 344, 348, 204 N.W.2d 482 (1973).[3] The supreme court stated further that "[i]f we are to adopt a pretrial discovery procedure in criminal cases in this state we deem it would be best done by a rule of court or by legislative action rather than on a case to case basis by the court." ***Miller***, 35 Wis. 2d at 478.

¶15 Following the enactment of the criminal discovery statute, the supreme court has continued to adhere to the principle that the right to discovery in criminal cases is limited to that which is provided by statute. *See, e.g,* ***State v. O'Brien***, 223 Wis. 2d 303, 319, 588 N.W.2d 8 (1999); ***State ex rel. Lynch v. County Ct.***, 82 Wis. 2d 454, 466, 262 N.W.2d 773 (1978); ***State v. O'Connor***, 77 Wis. 2d 261, 280 n. 7, 252 N.W.2d 671 (1977); ***Irby v. State***, 49 Wis. 2d 612, 620, 182 N.W.2d 251 (1971).[4]

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[3] In ***Wold v. State***, the supreme court observed that prior to the new criminal code, there was no "clear legal right" to discovery, and stated that "the question of whether a discovery motion would be granted was a matter of discretion with the trial court." ***Wold v. State***, 57 Wis. 2d 344, 348, 204 N.W.2d 482 (1973). However, the cases cited for that proposition state only that there is no right to pretrial discovery so that mandamus does not lie to compel it; they do not support the proposition that the court may, in the proper exercise of its discretion, *grant* discovery. *See* **Woodhull v. State**, 43 Wis. 2d 202, 215, 168 N.W.2d 281 (1969); ***State ex rel. Johnson v. County Ct.***, 41 Wis. 2d 188, 193, 163 N.W.2d 6 (1968); and ***State v. Miller***, 35 Wis. 2d 454, 478, 151 N.W.2d 157 (1967).

[4] Although the cited cases involve a defendant's request for pretrial discovery, we see no reason why the logic of *Miller* and

¶16 WISCONSIN STAT. § 971.23, which was enacted in 1969,[5] now grants limited discovery. *See Wold*, 57 Wis. 2d at 348-49. Pursuant to § 971.23 (1), entitled "WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT," the district attorney must disclose any written or recorded statement made by a defendant concerning the alleged crime; a written summary of the defendant's statements that the prosecutor plans to use at trial and any witnesses to such statements; evidence obtained through interception of wire, electronic or oral communications; a copy of the defendant's criminal record; a list of all witnesses the prosecutor intends to call, along with their addresses; any written or recorded statements of these witnesses; any criminal record of a prosecution witness which is known to the prosecution; any physical evidence the prosecutor intends to use at trial; and any exculpatory evidence. WIS. STAT. § 971.23(1)(a)-(h).

¶17 Pursuant to WIS. STAT. § 971.23(2m), entitled "WHAT A DEFENDANT MUST DISCLOSE TO THE DISTRICT ATTORNEY," the defendant must disclose all witnesses who the defendant intends to call at trial, along with their addresses; any written or recorded statements of these witnesses; reports or statements of experts, or a written summary if no report or statement has been

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subsequent cases would differ in cases involving pretrial discovery requested by the State.

[5] 1969 Wis. Laws, ch. 255, § 63.

prepared; the results of any examination, test, experiment or comparison that the defendant intends to offer in evidence at trial; the criminal record of any defense witness other than the defendant known to the defense attorney; and any physical evidence the defendant intends to offer at trial. WIS. STAT. § 971.23(2m)(a)-(c).

¶18 WISCONSIN STAT. § 971.23 does not require a criminal defendant to give pretrial notice of any specific theory of defense that the defendant intends to present at trial, other than a notice of "alibi." *See* WIS. STAT. § 971.23(8). In addition, the discovery statute does not require a defendant to divulge the details of his or her own case. *See* ***State v. Konkol***, 2002 WI App 174, ¶17, 256 Wis. 2d 725, 649 N.W.2d 300. Thus, the discovery statute does not require McClaren to give pretrial notice of a claim of self-defense or of intended ***McMorris*** evidence to support such a claim.

¶19 The State concedes that the court's order requires McClaren to disclose more information before trial than a defendant is required to do under WIS. STAT. § 971.23(2m). However, it argues that the court's authority to do so stems from Wisconsin case law that permits courts to order pretrial disclosure of certain types of evidence that, if delayed until trial, would potentially warrant a continuance of trial to enable the opposing party to investigate the proffer. In particular, the State refers to proffered "other acts" evidence. The State points out that in ***State v. Wallerman***, 203 Wis. 2d

158, 167-68, 552 N.W.2d 128 (Ct. App. 1996), we encouraged the circuit court to address the admissibility of "other acts" evidence pretrial if possible. We conclude that *Wallerman* is distinguishable on its facts and does not support the State's position.

¶20 In *Wallerman*, we addressed the circumstances under which a criminal defendant's concession of one or more elements of the crime charged can effectively bar the State from introducing evidence on those elements. At issue in *Wallerman* was the defendant's concession that whoever committed the sexual assault at issue in that case did so to obtain sexual gratification, which was an element of the crime charged. *Id.* at 165. In spite of the concession, the State sought to prove that element through the introduction of "other acts" evidence of motive and intent with respect to a prior sexual assault allegation against Wallerman. *Id.* at 162. The State argued that it was necessary for it to do so because Wallerman never explicitly offered to enter into a stipulation or make a concession regarding the motive and intent elements of the charges. *Id.* at 166.

¶21 We concluded that when a defendant is faced with "other acts" evidence but wishes to concede an element of the crime for which the evidence is being offered, it is necessary for the court to ensure that the record contains conclusive evidence upon which the jury may rely to find guilt before it relieves the State of the duty to prove that

element. *Id.* at 167. We then set out four guidelines designed to make sure that a defendant who wishes to make such a concession expresses his or her intent clearly and unequivocally. *Id.* at 167-68. Under these guidelines, courts are encouraged to: explore the breadth of the defendant's offer in order to determine exactly what the defendant is conceding to; access the State's evidence and determine whether the "other acts" evidence would still be necessary even with the defendant's concession; and personally voir dire the lawyers and the defendant to ensure that they each understand the effects of the concession. *Id.* In addition, we stated that "just like questions involving the admissibility of 'other acts' evidence, these concessions or stipulations should be addressed pretrial if possible." *Id.* at 168.

¶22 Assuming for the sake of argument that *McMorris* evidence is comparable to "other acts" evidence, nothing in *Wallerman* authorizes a circuit court to require, rather than encourage, pretrial disclosure. *Wallerman* involved the need for the circuit court to determine whether the defendant intended to, and did, make a concession. We concluded that the existence of a concession should be ascertained as early as possible in the proceedings. However, we did not hold that a defendant could be *required* to make this concession pretrial. Instead, we held that, to the extent a defendant makes a concession or stipulation, it is preferable to address the matter pretrial, if possible. Thus, our holding in *Wallerman* is not inconsistent with *Miller* and should not be read to authorize a

circuit court to require pretrial discovery beyond the dictates of WIS. STAT. § 971.23.

¶23 The State next argues that the circuit court's order requiring pretrial disclosure of *McMorris* evidence falls within the court's authority under WIS. STAT. § 906.11 to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." However, the general authority to superintend a trial cannot be read to permit a court to require pretrial discovery that it would otherwise not be authorized to do under WIS. STAT. § 971.23 and the rule in *Miller*.

¶24 Citing *State v. Revels*, 221 Wis. 2d 315, 319-21, 585 N.W.2d 602 (Ct. App 1998), the State also contends that discovery rules are rules of court procedure rather than substantive or penal provisions. Thus, it argues, discovery rules are not left exclusively to the legislature, and Wisconsin's appellate courts are equally free to develop them. The Wisconsin Court of Appeals does not possess supervisory authority which would permit it to promulgate rules of criminal practice and procedure. *See State v. Perez*, 170 Wis. 2d 130, 137, 487 N.W.2d 630 (Ct. App. 1992). Wisconsin's constitution and statutes reserve law-developing and law-declaring functions to the Wisconsin Supreme Court. *Id. See also State v. Schumacher*, 144 Wis. 2d 388, 405-07, 424 N.W.2d 672 (1988). To date, the Wisconsin Supreme Court has declined to adopt a pretrial discovery procedure in criminal cases beyond that provided by statute.

¶25 We conclude that the order of the circuit court would operate, in essence, as a discovery device, and would therefore be inconsistent with WIS. STAT. § 971.23(2m) and contrary to the holding in *Miller*. For the foregoing reasons, we reverse the circuit court's order requiring the pretrial disclosure of *McMorris* evidence.

By the Court.—Order reversed.

Recommended for publication in the official reports.

State of Wisconsin Circuit Court Jefferson County

State of Wisconsin
Plaintiff,
vs: Case No. 2007CF000144

Jason L. McClaren,
Defendant.

ORDER

Based on the record made at the October 2, 2007 hearing and the written submissions herein, the Court hereby Orders:

The defendant shall make written disclosure to the Court and the prosecution by the close of business on October 16, 2007, a summary of all specific instances of the victim's violent conduct of which the defendant was aware and that the defendant intends to introduce at trial, including witnesses to such conduct and the date and place such conduct occurred. Such disclosure does not include acts of the victim referenced in the defendant's interrogation on March 31, 2007.

Dated this 10th day of October, 2007.

BY THE COURT:

/s/ Randy R. Koschnick
Randy R. Koschnick
Circuit Court Judge

Pc: Attorney Happ
DA

CLERK OF THE CIRCUIT COURT
Jefferson County, Wisconsin
FILED
OCT 10 2007
_____o'clock _____M.
CARLA J. ROBINSON, Clerk

CONSTITUTIONAL PROVISIONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.